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No. 87-

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

EXXON COMPANY, U.S.A.,
A DIVISION OF EXXON CORPORATION,
Petitioner,

v.

BANQUE DE PARIS ET DES PAYS-BAS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

If after a federal court of appeals has entered judgment in a diversity case, but while the case remains *sub judice*, a state intermediate appellate court decides the controlling issue of state law in a manner that conflicts with the judgment of the federal court, should the federal court vacate its judgment and reconsider in order to ensure adherence to applicable state law? *

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* Petitioner Exxon Company, U.S.A., is a division of Exxon Corporation, whose affiliates and partially owned subsidiaries are listed in App. H.

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No. 87-

EXXON COMPANY, U.S.A.,
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v.

BANQUE DE PARIS ET DES PAYS-BAS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Exxon Company, U.S.A. ("Exxon"), hereby petitions for a writ of certiorari and asks this Court to vacate the judgment below and remand the case for reconsideration in light of the intervening decision on the controlling issue of Texas law in *Kerr Construction v. Plains National Bank*, No. 07-86-0205-CV (Tex. App.—Amarillo 1987, application for writ of error pending).

OPINIONS BELOW

The opinion of the court of appeals (App. A) is reported at 828 F.2d 1121. The opinion of the district court (App. B) is not officially reported but is reprinted at 828 F.2d 1127.

JURISDICTION

The judgment of the court of appeals (App. C) was entered on October 8, 1987. A timely petition for rehearing was denied on December 8, 1987 (App. D). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The Rules of Decision Act, 28 U.S.C. § 1652 (1982), provides:

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

STATEMENT

1. In 1981, Exxon and Houston Oil & Refining, Inc. ("Houston Oil"), entered into a contract to make reciprocal deliveries of crude oil. Exxon agreed to deliver 558,000 barrels of crude oil to Houston Oil during July, 1981, and Houston Oil agreed to deliver an equal quantity of crude oil to Exxon "during September through December 1981." App. A at 2a. The contract required Houston Oil to provide an irrevocable standby letter of credit to cover the crude oil being delivered by Exxon. This was standard commercial practice; pursuant to a letter of credit, an issuing bank undertakes to pay a beneficiary (here, Exxon) upon certification that the bank's customer (here, Houston Oil) has failed to perform on an underlying contract.

Houston Oil applied to respondent Banque de Paris et des Pays-Bas ("Paribas") to issue a letter of credit in the amount of $19,530,000.

> Because the transaction was in effect an extension of credit to Houston, Paribas required Houston to provide security sufficient to cover the amount of the

> credit and, as part of the security arrangement, the bank blocked certain funds coming into Houston's account. In addition, Paribas charged Houston a fee of $53,000 for establishing the credit.

App. A at 3a. A copy of the letter of credit was delivered to Exxon as the beneficiary. *Id.*

The letter of credit that Paribas issued was payable only upon the presentation, *inter alia*, of a signed statement certifying that Houston Oil "has failed to deliver [the crude oil] between September and December, 1981," App. A at 2a, which statement, however, was required to "be presented not later than October 31, 1981." *Id.* at 3a. Paribas itself was aware of "the apparent inconsistency" of these terms, under which "the letter [of credit] expired *on October 31*, yet covered deliveries *between September and December*." *Id.* (emphasis in original). Yet "Paribas never sought to amend the letter to remove the contradiction or to notify Exxon." App. B at 14a.

Exxon delivered 558,000 barrels of crude oil to Houston Oil in July, but Houston Oil made no reciprocal deliveries of crude oil to Exxon in either September or October. In late October, Exxon became aware that the terms of the letter of credit relating to certification and expiration appeared to conflict. In order to remedy this, Exxon asked Houston Oil to have the letter amended to correct the expiration date. Houston Oil represented that it would do so, but in fact it never did. App. A at 4a-5a.

Houston Oil did not make the required reciprocal deliveries of crude oil. "Exxon learned sometime in November that [Houston Oil] was going to default." App. B at 14a. As soon as it was possible for Exxon truthfully to certify that Houston Oil had failed to deliver "between September and December," Exxon requested payment from Paribas on the letter of credit. Paribas

refused payment, contending that Exxon's request was untimely. *Id.*

2. Exxon then instituted this action against Paribas in the 234th Judicial District Court of Harris County, Texas, to recover on the letter of credit. Paribas removed the case to the United States District Court for the Southern District of Texas, where jurisdiction rested on 28 U.S.C. § 1332(a)(2).

The district court ruled for Exxon on cross-motions for summary judgment. The court began its analysis by noting the peculiar manner in which the terms of the letter of credit appeared to cancel out one another and render performance impossible:

> Two provisions of the letter clash. The certification provision requires that in order to collect under the letter, Exxon must certify that [Houston Oil] failed to deliver the required volume of crude in September-December. On the other hand, the presentment clause requires the certification of non-delivery to be made by October 31, 1981. . . .
>
> . . . Obviously Exxon could not have certified on October 31 that [Houston Oil] had not delivered through the end of the following two months.

App. B at 13a-14a, 15a.

These considerations, the court reasoned, brought into play two important rules of contract construction under Texas law: "[i]nconsistencies must be resolved against the party who drew the contract," App. B at 14a, and "contracts must be construed to render performance possible." *Id.* at 14a-15a. The court concluded that these rules foreclosed a reading of the letter of credit that would cause the time for presentment to expire before it had become possible for Exxon to certify Houston Oil's failure to deliver. The court also noted that *BA Commercial Corp. v. Hynutek, Inc.*, 705 S.W. 2d 713 (Tex. App. ——

Dallas 1986, no writ), involving interpretation of a letter of guaranty, further demonstrated that Texas law would not countenance a construction that would frustrate the parties' essential purpose in securing the letter of credit. App. B at 15a. Accordingly, the court held that Texas law dictated "[a] construction in favor of Exxon." *Id.* at 14a.

3. On October 8, 1987, a divided panel of the Fifth Circuit reversed. The majority implicitly acknowledged that Texas law controlled. *See, e.g.*, App. A at 3a n.2, 6a nn.5 & 7, 7a n.12, 8a n.15, 10a. But treating the specific question before it as a matter of first impression, and drawing largely upon non-Texas authorities with only passing reference to the Texas authorities on which the district court had relied, the majority held "that the letter of credit issued by Paribas required no construction and that it terminated on its express expiry date." App. A at 11a.

Judge Garza dissented:

> The majority, focusing on the expiry date and nothing else, in effect makes the letter of credit involved in this case a nullity.
>
> I agree with the court below that if Exxon had made any claim against the letter of credit before October 31, 1981, the Banque would not have honored any claim because Houston Oil . . . still had the months of November and December to return to Exxon the oil that [it] had recevied under the original contract between Houston Oil . . . and Exxon.
>
> I am convinced that the Texas judge sitting on the court below, interpreting the letter of credit under Texas law, was correct.

App. A at 11a-12a.

The court denied a timely petition for rehearing on December 8, 1987. App. D.

4. On November 17, 1987, after the time for filing a petition for rehearing in this case had expired but be-

fore rehearing was denied, the Court of Appeals for the Seventh District of Texas at Amarillo decided precisely the same issue of Texas law in *Kerr Construction Co. v. Plains National Bank*, No. 07-86-0205-CV.[1] *Kerr Construction*, like this case, involved an effort to recover on a letter of credit with inconsistent terms relating to certification and expiration. But the Texas court, unlike the Fifth Circuit, held that in such circumstances the inconsistent expiry date is unenforceable. The court reasoned that such a letter of credit must be enforced in a sensible manner that grants the beneficiary an opportunity to make presentation for payment after it becomes possible to certify, in accordance with the terms of the certification provision, that the issuer's customer has failed to perform on the underlying contract.

The two cases are on all fours, except as to result. In *Kerr Construction*, the letter of credit had been issued on September 17, 1984, and it provided that presentation for payment was to be accompanied by a signed statement that the issuer's customer had failed to perform on the underlying contract "within ten (10) months," App. E at 22a, *i.e.*, that the customer had failed to complete performance by July 17, 1985. The expiry date, however, was January 1, 1985 (later extended to July 1, 1985). *Id.* at 23a, 24a. The underlying contract remained uncompleted on July 17, 1985, and the beneficiary presented the letter for payment on that date. *Id.* at 24a. The issuer refused payment on the ground that the letter of credit had expired. *Id.*

The Texas court held that the presentation for payment had been timely:

> It is well settled that the rules of construction for ordinary contracts govern letters of credit. It is equally well settled that where there is an irreconcilable conflict between different parts or provisions

[1] The opinion in *Kerr Construction* is reproduced at App. E.

> of an instrument and the first part or provision is definite and certain and irreconcilable with later parts or provisions, the first part or provision must prevail. In this instance, it is undisputed that the first provision of the instrument [relating to certification] is in direct and irreconcilable conflict with the last provision of the instrument [relating to the expiry date] . . .
>
> It [also] is well settled [that] when there is an irreconcilable conflict between provisions in an agreement, the provision which contributes most essentially to the agreement is entitled to the most consideration.

App. E at 24a-25a (citations omitted). Because the basic "purpose of the letter of credit was assurance to the [beneficiary]," *id.* at 27a, the court concluded that the express expiry date, which would have rendered such assurance illusory, must give way.

5. Exxon did not become aware of *Kerr Construction* until after the denial of rehearing and issuance of mandate in this case. When it did learn of *Kerr Construction*, Exxon immediately called the decision to the attention of the Fifth Circuit by moving for recall of mandate and for leave to file a suggestion for *en banc* consideration (including a request that the issue be certified to the Texas Supreme Court).[2] Both motions were denied on February 12, 1988. App. F and G.

REASONS FOR GRANTING THE WRIT

This case calls for the exercise of this Court's supervisory authority over the administration of federal diversity jurisdiction. The intervening decision by the state

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[2] In the Fifth Circuit, " '[a] suggestion for rehearing *en banc* will be treated as a petition for rehearing by the panel if no petition is filed. The panel may grant rehearing without action by the full Court.' " *Gonzalez v. Southern Pacific Transp. Co.*, 773 F.2d 637, 641 (5th Cir. 1985), quoting from the Internal Operating Procedures of the Fifth Circuit.

appellate court in *Kerr Construction* demonstrates that the Fifth Circuit misapplied Texas law. The Fifth Circuit's failure to reconsider and to correct this error, once brought to its attention while the case was still *sub judice*, conflicts both with this Court's decision in *Huddleston v. Dwyer*, 322 U.S. 232 (1944), and with the decision of the Second Circuit in *Braniff Airways, Inc. v. Curtiss-Wright Corp.*, 424 F.2d 427 (2d Cir.), *cert. denied sub nom. Addabbo v. Curtiss-Wright Corp.*, 400 U.S. 829 (1970). This Court should grant certiorari, vacate the judgment below, and remand with instructions that the Fifth Circuit reconsider in light of *Kerr Construction*.

1. A federal court exercising diversity jurisdiction must follow and apply state law. *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938). "In essence, the intent of [*Erie*] was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, as far as legal rules determine the outcome of a litigation, as it would be if tried in a State court." *Guaranty Trust Co. v. York*, 326 U.S. 99, 109 (1945).

The federal court's duty to follow state law does not expire with initial entry of judgment. It continues as long as the diversity case remains *sub judice*:

> While not insensible to possible complications, we are of the view that, until such time as a case is no longer *sub judice*, the duty rests upon federal courts to apply state law under the Rules of Decision Statute in accordance with the then controlling decision of the highest state court.

Vandenbark v. Owens-Illinois Co., 311 U.S. 538, 543 (1941). In *Vandenbark*, the Court had been concerned with the effect of a change in state law occurring after entry of judgment in a district court but before the initial disposition of the case on appeal. But in *Huddleston*

the Court made clear that the principle stated in *Vandenbark* also applies when the change in state law occurs after the federal court of appeals has entered judgment: the federal court is obligated to correct its judgment to conform to the newly announced state rule.

The facts in *Huddleston* were similar to those here. In a diversity case involving Oklahoma law, the Tenth Circuit had entered judgment based upon its "examination of Oklahoma authorities." 322 U.S. at 234. The following sequence of events then occurred:

> Petitioners filed a timely petition for rehearing which was denied on September 1, 1943. On December 17, 1943, petitioners moved for leave to file a second petition for rehearing which the Circuit Court of Appeals denied. In that second petition, petitioners brought to the attention of the court and relied upon an opinion of the Supreme Court of Oklahoma in *Wilson v. City of Hollis*, . . . which had superseded its earlier opinion on which the Circuit Court of Appeals had relied in its opinion in this case.

Id. at 235. Because the court of appeals had failed to amend its judgment to reflect the intervening decision in *Wilson*, this Court granted certiorari, "vacate[d] the judgment below and remand[ed] the cause to the Circuit Court of Appeals so that it may reconsider its decision in the light of the decisions and opinions of the Supreme Court of Oklahoma in the *Wilson* and later cases." *Id.* at 237-38.

In view of *Huddleston*, the proper course of action for federal courts of appeals in cases like this is that charted by the Second Circuit in *Braniff*. There, judgment initially had been entered in May, 1969, and rehearing was denied in June. Three weeks later, the Florida Supreme Court "reversed the intermediate appellate court decision on which we had relied." 424 F.2d at 429. The losing party in the Second Circuit discovered the intervening Florida decision only after filing a petition for

certiorari; while that petition was pending, the party moved in the Second Circuit for leave to file a petition for rehearing out of time. In a carefully reasoned opinion, the Second Circuit determined that it was obligated to reconsider its prior judgment:

> In *Huddleston*, the petitioners had sought a second rehearing some six months after entry of judgment, a period considerably longer than that before us. The Supreme Court indicated that so long as the case was "*sub judice*" the court of appeals should have entertained the petition for rehearing based on a change in state law; it did not indicate, however, precisely what the bounds of the term "*sub judice*" might be. Under circumstances similar to *Huddleston*, we may consider petitions filed after rehearing has been denied, and even after the time to petition for rehearing has passed, *see* F.R.A.P. 40. The question we must determine is whether we should also entertain rehearings when a petition for certiorari already has been filed. *Huddleston* seems to indicate that we should. Instead of reversing the court of appeals, and deciding the state law issues itself, the Supreme Court there vacated the court of appeals decision, and remanded to that court to permit it to determine the issues of state law in the first instance, on the basis of the new state court decision. For us to refuse to consider petitions for rehearing under the circumstances present here merely because a petition for certiorari has been filed would be, it seems to us, wasteful, for under the *Huddleston* procedure the Supreme Court would not reach the merits of the controversy, but would vacate our decision and order us to reconsider on the basis of the recent state opinion. Hence we conclude that in the interests of justice we should consider what effect the Florida Supreme Court's [intervening] decision . . . will have on our prior judgment in this case.

Id. at 429-30.

The Fifth Circuit's failure to undertake reconsideration in this case is inconsistent with this Court's disposition of *Huddleston* and conflicts with the action and reasoning of the Second Circuit in *Braniff*.

2. Fidelity to the *Erie* principle requires federal courts sitting in diversity cases to follow the decisions of a state's intermediate appellate courts in the absence of persuasive evidence that the state's highest court would decide otherwise. *E.g.*, *West v. American T & T Co.*, 311 U.S. 223, 237 (1940); *Six Companies v. Highway District*, 311 U.S. 180, 188 (1940). The decision of the intermediate appellate court in *Kerr Construction* follows and fits comfortably within existing Texas precedent. It therefore stands as the controlling statement of Texas law for purposes of this diversity litigation.

Under Texas law, "letters of credit are subject to the same rules of construction that apply to ordinary contracts." App. B at 14a, *citing Temple-Eastex, Inc. v. Addison Bank*, 672 S.W. 2d 793, 798 (Tex. 1984). Because the primary concern in interpreting any contract is to determine the true intentions of the parties, *e.g.*, *Gracia v. RC Cola-7 Up Bottling, Inc.*, 667 S.W. 2d 517, 520 (Tex. 1984), "[i]f two constructions are possible, a construction rendering the contract possible of performance will be peferred to one that renders its performance impossible or meaningless." *Temple-Eastex*, 672 S.W. 2d at 798. This rule of construction dictated the result in *Kerr Construction* by requiring priority to be given to the certification provision, not the expiry date. If the expiry date of the letter of credit had been controlling, the beneficiary would have had no protection at all against nonperformance of the underlying contract: the letter of credit would have been an empty and meaningless promise, and the contracting parties' purpose in securing it would have been totally frustrated. As in *BA Commercial*, which involved a similar issue arising under a letter of guaranty, a literal application of the expiry date would have made a "proper demand [for payment] tech-

nically impossible and, therefore, contrary to the intent of the parties." 705 S.W. 2d at 716.

By giving priority to the certification provision rather than the expiry date, the *Kerr Construction* court also was applying two other well-established rules of contract construction under Texas law: (1) when contractual provisions appear to conflict, the first provision appearing in the document controls, *Witt v. Harlan*, 2 S.W. 41, 42 (Tex. 1886); (2) a letter of credit must be construed against the issuer, *Temple-Eastex*, 672 S.W. 2d at 798; *Republic National Bank v. Northwest National Bank*, 578 S.W. 2d 109, 115 (Tex. 1978). Thus there is no reason to believe that the Texas Supreme Court would disagree with the holding of *Kerr Construction*.

3. Exxon originally brought this action in state court. As a result of the decision below, and the Fifth Circuit's failure to correct that decision in light of *Kerr Construction*, Exxon has been denied the benefit of the substantive law that would have governed its claim if the action had not been removed to federal court.

This is no trivial matter. The Fifth Circuit has deprived Exxon of a recovery in excess of $26 million, including interest, that was entirely valid under state law. This result strikes at the very heart of the *Erie* principle. To permit a defendant like Paribas to evade liability through the simple expedient of removing to federal court would be to "create discrimination against citizens of the State in favor of those authorized to invoke the diversity jurisdiction of the federal courts. It was that element of discrimination that *Erie R. Co. v. Tompkins* was designed to eliminate." *Woods v. Interstate Realty Co.*, 337 U.S. 535, 538 (1949).

As *Huddleston* and *Braniff* demonstrate, the federal courts of appeals, when exercising diversity jurisdiction, must be alert to apply state decisions that are handed down after initial entry of judgment on appeal. To be

sure, at some point litigation must come to an end; a federal court's duty to reconsider its judgments in light of intervening state law can extend only so far. Thus, a state decision handed down, or brought to the federal court's attention, after denial of certiorari (or after the time for petitioning for certiorari has expired, if no petition is filed) arguably would come too late to trigger the obligation to follow state law. But that is not this case. Here, the intervening state decision was handed down prior to the Fifth Circuit's denial of rehearing and was called to the attention of the Fifth Circuit well in advance of the timely filing of this petition for certiorari, at a time when the case plainly remained "*sub judice*" as that phrase was used in *Huddleston* and *Braniff*.

Nor is this a case where the intervening state decision has only tangential or merely arguable relevance. The Texas court in *Kerr Construction* squarely held, in circumstances virtually identical to those here, that when the certification provision and expiry date of a letter of credit conflict, it is the certification provision and not the expiry date that controls. That holding is directly contrary to the Fifth Circuit's holding below. But even if there were an arguable basis for distinguishing the two cases, Exxon's assertion of a conflict between the two decisions is sufficiently plausible on its face to require explicit reconsideration by the federal court. *See Factors, Etc., Inc. v. Pro Arts, Inc.*, 701 F.2d 11 (2d Cir. 1983). That is the minimum that *Erie* requires.

4. The Fifth Circuit predicated its denial of Exxon's motion for recall of mandate on the ground that the opinion in *Kerr Construction* bears the legend "Do not publish. Tex. R. App. P. 90(e)." App. E at 28a. *See* App. F. This was wrong for two reasons.

First, the very fact that the state appellate court chose not to publish its opinion confirms that *Kerr Construction* involved a noncontroversial application of settled principles of Texas law. The decision not to publish re-

flects the court's determination that the opinion is not one "that (1) establishes a new rule of law, alters or modifies an existing rule, or applies an existing rule to a novel fact situation likely to recur in future cases; (2) involves a legal issue of continuing public interest; (3) criticizes existing law; or (4) resolves an apparent conflict of authority." Tex. R. P. 90(e). It would make a mockery of the *Erie* principle if federal courts were permitted to disregard state appellate court decisions that go unpublished merely because they stand in the undisputed mainstream of state law.

Second, *Kerr Construction* itself remains *sub judice*, and the appellate court's opinion in that case may still be released for publication. At present, *Kerr Construction* is pending before the Texas Supreme Court on application for writ of error. "Upon the grant or refusal of an application for writ of error, whether by outright refusal or by refusal no reversible error, an opinion previously unpublished shall forthwith be released for publication, if the [Texas] Supreme Court so orders." Tex. R. App. P. 90(h). In these circumstances, the Fifth Circuit at the very least should have stayed further proceedings in this case pending disposition of the application in *Kerr Construction*. Exxon should not be deprived of its right to recover $26 million under Texas law merely because the Fifth Circuit was too impatient to await a decision by the Texas Supreme Court that almost certainly will be controlling both on the merits and on the matter of publication.

In denying the motion for recall of mandate, the Fifth Circuit referred to Tex. R. App. P. 90(i), which bars the citation of unpublished opinions as authority. App. F. That rule would not have prevented an informed application of Texas law if this case had remained in state court. If the case had been decided agaist Exxon by a state appellate court rather than by the Fifth Circuit, Exxon could have moved to consolidate its case with

Kerr Construction in the Texas Supreme Court and have asked that Court to resolve the obvious conflict presented by the two cases.[3] The Texas Supreme Court then would have been able to correct the misapplication of Texas law in Exxon's case and extend to Exxon the benefits of the reasoning and holding in *Kerr Construction*. Under *Erie*, *Huddleston*, and *Braniff*, Exxon cannot be denied those benefits merely because Paribas removed this case to federal court.

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the Fifth Circuit vacated, and the case remanded with instructions either to reconsider in light of *Kerr Construction* or, alternatively, to stay further proceedings pending disposition of the application for writ of error in *Kerr Construction* and then to reconsider in light of that disposition.

Respectfully submitted,

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[3] A similar result could have been achieved here if the Fifth Circuit had acted upon Exxon's suggestion that the issue be certified to the Texas Supreme Court pursuant to Tex. R. App. P. 114(a).

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 87-2007

EXXON COMPANY, U.S.A.,
A DIVISION OF EXXON CORPORATION,
Plaintiff-Appellee Cross-Appellant,

v.

BANQUE DE PARIS ET DES PAYS-BAS,
Defendant-Appellant Cross-Appellee.

Oct. 8, 1987

Before RUBIN, GARZA, and JOLLY, Circuit Judges.

ALVIN B. RUBIN, Circuit Judge:

Standby letters of credit are issued by banks to assure the prompt payment of money to a party to another contract in the event that the other contract is not performed in accordance with its terms. The issuing bank is required to make payment only if it is presented with specified documents. The function of letters of credit requires that they be succinct and clear, for their utility lies in the assurance they provide that payment will be made on the specified terms without delay or litigation.

In this action for the wrongful dishonor of a letter of credit on which payment was demanded after the stated expiry date of the credit, we find that the obliga-

tion of the issuing bank had terminated even though it might not have been possible to present to the bank the documents required for payment before the expiry date. We therefore reverse the district court judgment holding the bank liable.

I.

In July 1981, Houston Oil & Refining, Inc. entered into a contract with Exxon Company, U.S.A., under which Exxon would deliver 558,000 barrels of crude oil to Houston in July and Houston would deliver an equal quantity of crude oil to Exxon "*during* September through December 1981. Exxon made this trade because it had closed part of one of its refineries for maintenance and therefore had a surplus of crude oil. The contract required Houston to provide an irrevocable standby letter of credit to cover the value of the oil delivered by Exxon. It stated that the letter of credit was to be payable to Exxon "on presentation of invoices or [a] statement of an officer of Exxon certifying that invoices are unpaid and past due ten (10) days or more."

Houston then applied to Banque de Paris et des Pays-Bas, also known as Paribas, for a letter of credit in the amount of $19,530,000. In its application, Houston stated that the letter of credit was to be payable upon presentation of specified invoices; pipeline tickets or transfer statements; and a

> [s]tatement signed by an authorized representative certifying that Houston Oil & Refining, Inc. *has failed to deliver* to Exxon Company, U.S.A. 558,000 barrels of one of the following: South Louisiana to St. James, La., West Texas Sour to Shell, McCamey or Exxon, Grane, Arab Light to U.S. Gulf Coast or Alaskan North Slope to U.S. Gulf Coast *between September and December, 1981.*[1]

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[1] Emphasis added.

The application also expressly requested that the letter of credit expire on October 31, 1981.

Because the transaction was in effect an extension of credit to Houston, Paribas required Houston to provide security sufficient to cover the amount of the credit, and, as part of the security arrangement, the bank blocked certain funds coming into Houston's account. In addition, Paribas charged Houston a fee of $53,000 for establishing the credit.

On July 16, 1981, Paribas "opened" the credit by telex and delivered a copy of it to Exxon as requested by Houston. The credit stated that it was to be paid against the documents specified in the application, and that these documents "must be presented not later than October 31, 1981." Because October 31 would be a Saturday, the documents could also be presented on the next business day, Monday, November 2.[2] The credit also stated that it was subject to the 1974 revision of the Uniform Customs & Practice for Documentary Credits, a set of rules promulgated by the International Chamber of Commerce.[3]

Because the letter expired *on October 31*, yet covered deliveries *between September and December*, Paribas checked with Houston twice—both before and after issuing the letter—to make sure that the terms specified by Houston in its application were indeed what it had intended. Before the letter was issued, Flozella Telfair, the Paribas employee who dealt with the application, noted the apparent inconsistency and communicated with Houston. Upon receiving Houston's affirmation that the terms

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[2] Tex.Bus. & Com.Code Ann. § 3.503(c) (Vernon 1968); Uniform Customs & Practice for Documentary Credits art. 39, para. a, Int'l Chamber of Commerce Pub. No. 290 (1974 rev), *reprinted in* H. Harfield, *Letters of Credit* 135, 154 (1979).

[3] International Chamber of Commerce Pub. No. 290, *reprinted in* H. Harfield, *Letters of Credit* 135 (1979) [hereinafter cited as *Uniform Customs*].

were correct, Telfair drew circles on the application around both the October 31 expiration date and the September-December period specified for delivery, and next to these terms made the notation "OK as per HOR and R.P." (HOR was Houston, and R.P. was Rene Perdreaux, a Paribas lending officer responsible for the Houston account.) Subsequently, after the letter had been issued, Hal Peist, a letter of credit professional at Paribas, discussed its terms with Robert Wheelock at Houston and asked whether a change in the expiration date was desired. Wheelock responded negatively.

When the credit was opened, Paribas sent a copy of the letter to the attention of Don Meiers, the Exxon employee responsible for receiving and transmitting letters of credit and monitoring their expiration dates. Meiers received the letter of credit and transmitted it to the appropriate executives at Exxon with a letter stating that it "is due to expire October 31, 1981." Meiers' transmittal letter also noted that the credit covered the delivery of crude oil by Exxon during July and "the return" of the crude by Houston "between September and December 1981." No one at Exxon complained or even suggested that these terms were not fully satisfactory.

Exxon was an experienced trader of crude oil. It commonly balanced its crude oil supply by entering into exchanges and, unless it was dealing with a major oil company, secured those exchanges by receiving letters of credit issued in its favor. Exxon knew from its experience that it could insist on the amendment of unsatisfactory letters of credit, and it followed the practice of delaying the delivery of crude oil to its trading partners until it had actually received a satisfactory letter.

Houston made no delivery of crude oil to Exxon during September or October of 1981. Before October 31, Meiers brought the problem of Exxon's exposure to loss under the exchange contract to the attention of higher

management at Exxon. Exxon asked Houston to obtain an extension of the letter of credit, but did not communicate with Paribas. On October 30, Joe Imparato, the president of Houston and a former Exxon employee, said that he would extend the letter of credit on Monday, November 2; however, he did not do so. When Imparato visited Exxon during the week of November 2, he stated that Houston would not be able to return the crude oil under the contract, and asked whether Exxon would be willing to convert Houston's obligation into a long term debt. Exxon's representatives told Imparato that such an arrangement would be unsatisfactory, and that they would insist on performance as required by the contract.

During November, Paribas released both the security that it had held for its extension of credit to Houston and the funds that it had blocked in Houston's account. Subsequently, on November 30 and on December 1, Exxon attempted to obtain payment by presenting documents to Paribas. Paribas rejected both presentations as untimely.

II.

The district court found a "clash" between the expiry date in the letter and the dates specified for performance of the underlying contract. It held, however, that the letter of credit was not ambiguous because its meaning could be made certain "by application of the rules of [contract] construction." The court resolved the "inconsistency" in part by interpreting the letter of credit against its author, the bank—a rule of construction that generally applies only to clarify ambiguity[4]—and by reading the letter in such fashion as to make performance possible. The court thus construed the contract "in favor of Exxon" and, extending but not defining the

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[4] *See Richland Plantation Co. v. Justiss-Mears Oil Co.*, 671 F.2d 154, 156 (5th Cir. 1982); *Chevron Oil Co. v. E.D. Walton Const. Co.*, 517 F.2d 1119, 1122 (5th Cir. 1975).

expiry date, entered summary judgment in Exxon's favor.

III.

A letter of credit "means an engagement by a bank . . . made at the request of a customer . . . that the issuer will honor drafts or other demands for payment upon compliance with the conditions specified in the credit." [5] The purpose of a standby letter is to insure that one or more parties to a contract will perform their duties under it.[6] The credit substitutes a known, accessible, and demonstrably impeccable source of funds in the event of default by the party whose performance it guarantees. Letters of credit facilitate commercial transactions, particularly in international commerce, by assuring certainty in application, consistency in interpretation across jurisdictional boundaries, and swiftness in execution. By eliminating credit risks, they reduce the cost of commercial transactions.

The transaction involves three separate contracts: The first one is the underlying commercial contract between two parties, one of whom will later apply to a bank for the letter, and the other of whom will be the beneficiary of the letter. The terms of this contract may not become known to the bank. The second contract is between the issuer of the letter of credit—typically a commercial bank—and its customer, who in applying for the letter asks the bank to draft the letter in conformance with specified terms. The third contract, the letter of credit itself, is between the issuer and the beneficiary.[7] The

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[5] Tex.Bus. & Com.Code Ann. § 5.103(a)(1) (Vernon 1968).

[6] *East Girard Sav. Ass'n v. Citizens Nat'l Bank & Trust Co.*, 593 F.2d 598, 601 (5th Cir. 1979).

[7] *See East Girard Sav. Ass'n*, 593 F.2d at 601; *Sisalcords do Brazil, Ltd. v. Fiacao Brasileira de Sisal, S.A.*, 450 F.2d 419, 422 (5th Cir. 1971), *cert. denied*, 406 U.S. 919, 92 S.Ct. 1771, 32 L.Ed.2d 118 (1972); *Republic Nat'l Bank v. Northwest Nat'l Bank*, 578 S.W.2d 109, 112 (Tex. 1978).

issuer unconditionally and irrevocably binds itself to pay a specified sum upon presentation of documents complying with the terms of the credit. The issuer's obligation to pay the beneficiary is generally independent of any obligation of the issuer's customer to the beneficiary,[8] and the issuer has no obligation to pay unless the beneficiary strictly complies with the conditions contained in the credit.[9] An issuer who makes payment upon a presentation that does not conform to the requirements of the credit losses its right to repayment from its customers.[10]

A letter of credit is therefore strictly construed.[11] The issuer is required to act in good faith and to observe any general banking usage, but is not charged with responsibility for knowledge or lack of knowledge of any usage of the trade in which the customer and beneficiary are involved.[12] It must determine whether to make payment to the beneficiary "on the basis of the documents [presented to it] alone."[13]

A half century ago, when a particular letter of credit did not specify an expiration date, courts required that necessary documents be presented to the issuing bank "within a reasonable time."[14] Eventually, that formulation proved to be commercially unsatisfactory because it

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[8] J. White & R. Summers, *Handbook of the Law Under the Uniform Commercial Code* 711-12 (2d ed. 1971).

[9] *Venizelos, S.A. v. Chase Manhattan Bank*, 425 F.2d 461, 464-65 (2d Cir. 1970); *see also Republic Nat'l Bank*, 578 S.W.2d at 114-15.

[10] *Philadelphia Gear Corp. v. Central Bank*, 717 F.2d 230, 236 (5th Cir. 1983).

[11] H. Harfield, *supra*, at 36.

[12] Tex.Bus. & Com.Code Ann. § 5.109(a), (a)(3) (Vernon 1968).

[13] *Uniform Customs* art. 8, para. c.

[14] *See Lamborn v. Nat'l Park Bank*, 240 N.Y. 520, 148 N.E. 664, 666 (1925).

left a bank's obligation uncertain and open-ended. To solve this problem, the International Chamber of Commerce adopted the Uniform Customs & Practice for Documentary Credits. Article 37 of the *Uniform Customs* requires all letters of credit made subject to it to stipulate an expiry date. Paribas' letter of credit expressly incorporated by reference the *Uniform Customs*, and therefore by necessity stated a specific termination date.

The need for a precise expiration date is particularly acute when a standby letter of credit is issued. Although such a credit is different from a surety bond or a guaranty, it does assure payment in the event the account party fails to perform an underlying contract with the beneficiary, the terms of which may be unknown to the issuer. The standby credit is therefore an extension of a bank's credit to its customer and, for this reason, it is subject to the statutory and regulatory loan limits imposed upon lending institutions.[15] Because the issuer of a standby credit does not hold documents representing goods in a commercial transaction, it cannot look to those documents as security for repayment by its customer.[16] Therefore, the issuer must look solely to the financial strength of its customer and to whatever security it has required for issuance of the credit. The length of time that an issuer remains liable for a failure to perform by its customer is obviously a matter of critical importance to the issuing bank, to the customer who must pay for the credit, and to the regulatory authorities that monitor the bank's activities.[17] Good banking practice and common sense require that the bank's liability terminate at a date certain.

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[15] *Republic Nat'l Bank*, 578 S.W.2d at 114.

[16] *See Consolidated Aluminum Corp. v. Bank of Virginia*, 544 F.Supp. 386, 393-94 (D.Md. 1982), *aff'd*, 704 F.2d 136 (4th Cir. 1983).

[17] *See* J. Dolan, *The Law of Letters of Credit* ¶ 5.03[3][e] (1984).

IV.

The issue before us is not the clarification of a contract susceptible to more than one interpretation. The expiry date in the letter of credit is as certain as words permit. The requirement in the letter that Exxon certify, no later than October 31, 1981, that Houston "has failed to deliver . . . between September and December, 1981" created no uncertainty on the face of the letter as to its expiration date.[18]

Counsel for both sides have stated that the phrasing of the required certification, that Houston "*has failed* to deliver" the crude oil, excludes the possibility of presentation before the end of the stated delivery period. If that were indeed Exxon's understanding, then it should have refused the letter when tendered. The terms of the credit departed in more than one respect from the Exxon-Houston contract. As we have noted, that contract provided that the credit was to be payable "on presentation of invoices or [a] statement of an officer of Exxon certifying that invoices are unpaid and past due ten (10) days or more," and also provided that deliveries were to be made *during* September through December. Houston instead applied to Paribas for a letter of credit requiring a statement "by an authorized representative certifying that Houston . . . has failed to deliver . . . between September and December." If either these discrepancies or the expiry date did not satisfy Exxon, it simply should have declined to accept the credit and refused to deliver oil to Houston. Exxon's decision to deliver suggests the possibility that, as contended by counsel for Paribas, Exxon was relying at least in part on its business deal-

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[18] *Cf. Liberty Nat'l Bank & Trust Co. v. Bank of America Nat'l Trust & Sav. Ass'n*, 218 F.2d 831, 840-41 (10th Cir. 1955); *BA Commercial Corp. v. Hynutek, Inc.*, 705 S.W.2d 713, 715 (Tex.Ct. App. 1986, no writ).

ings with Houston and its relationship with Imparato, a former crude oil trader at Exxon.

Exxon does not suggest that Paribas acted fraudulently. Nor does Exxon allege that Houston specified the expiration date of October 31 as the result of inadvertence or mistake, or that Exxon was mistaken as to that date when it accepted the letter. Indeed, the evidence shows that Exxon employees noted the expiry date upon their receipt of the letter of credit and that in late October Exxon asked Houston to obtain an extension of the expiry date.

Exxon does assert that Paribas did not act in "good faith" toward Exxon when it issued a letter of credit that its employees had questioned as "not mak[ing] sense" when Paribas knew that the letter was designed to secure Houston's contractual obligations to Exxon. No authority has been cited to us, and we have found none, that imposes on an issuer a duty to the beneficiary to "make sense" of the customer's application. As provided by Tex.Bus. & Com.Code Ann. § 5.109(a), Paribas did owe a duty of good faith to Houston, its customer. Tex. Bus. & Com.Code Ann. § 1.201(19) defines the standard of "good faith" as "honesty in fact in the conduct or transaction concerned." As mentioned earlier, Paribas checked with Houston both before and after issuing the letter to make sure that the terms specified in the application were what Houston intended. Thus, Paribas acted honestly toward Houston. Paribas' acceptance of Houston's assurances could not indicate dishonesty toward Exxon, for the expiration date was apparent on the letter when Paribas delivered it to Exxon. Paribas could tell Exxon no more than what was on the face of the letter, and Paribas knew that Exxon could insist on amendments to the letter if it was not saitsfied. Moreover, as already noted, Exxon has not alleged fraud against the bank or Houston. Paribas therefore complied entirely

with the terms of the letter when it interpreted the credit as having expired on November 2 and released its security to Houston.

As a lawyer experienced in letter of credit transactions has written, cautioning issuers, "the legality of a letter-of-credit transaction should not be equated with its prudence or commercial sense." [19] In like measure, the issuer is not charged with determining the utility to, or prudence of, a beneficiary who acts in reliance on its letter of credit. In letter-of-credit transactions, as in many other legal areas, certainty of result and practicality of performance by laymen are of paramount importance. As Exxon asserts, it was required to comply with "whatever requirements that Paribas established" "to the last comma, the last semicolon, . . . and, if they [did] that, they [were] entitled to be paid." It follows that, if Exxon did not do that, it was not entitled to be paid.

We therefore hold that the letter of credit issued by Paribas required no construction and that it terminated on its express expiry date. The summary judgment is REVERSED and judgment is entered for Paribas.

GARZA, Circuit Judge, dissenting.

I respectfully dissent.

The majority, focusing on the expiry date and nothing else, in effect makes the letter of credit involved in this case a nullity.

I agree with the court below that if Exxon had made any claim against the letter of credit before October 31, 1981, the Banque would not have honored any claim because Houston Oil and Refinery, Inc. still had the months of November and December to return to Exxon the oil that they had received under the original contract between Houston Oil and Refining, Inc. and Exxon.

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[19] Harfield, *Code, Customs & Conscience in Letter-of-Credit Law*, 4 U.C.C.L.J. 7, 14 (1971).

I am convinced that the Texas judge sitting on the court below, interpreting the letter of credit under Texas law, was correct. I would affirm the granting of summary judgment to Exxon on the basis of his memorandum opinion of September 17, 1986, which is attached as Appendix A to this dissent.

[Appendix A to Judge Garza's dissent was the opinion of the district court, which is reprinted as Appendix B to this petition.]

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. H-82-3481

EXXON COMPANY, U.S.A.,
Plaintiff,

VS.

BANQUE DE PARIS ET DES PAY-BAS,
Defendant.

MEMORANDUM

This action requires the construction of a letter of credit (letter) issued by the Banque de Paris et des Pay-Bas (Paribas) for the benefit of Exxon Company, U.S.A., (Exxon) to secure an obligation of Houston Oil and Refining, Inc. (HORI). The parties have filed cross-motions for summary judgment. The court will grant Exxon's motion and deny Paribas's motion.

On July 9, 1981, Exxon and HORI entered into an oil exchange agreement (agreement). Exxon, finding that it had a temporary surplus of crude oil at its Baton Rouge refinery, contracted to ship HORI approximately 558,000 barrels of crude in July 1981, and HORI agreed to deliver the same amount of crude to Exxon during September through December, 1981. The agreement required HORI to secure its obligation by a letter of credit in favor of Exxon for $19,530,000. On HORI's application, Paribas, for a fee of approximately $50,000, issued the letter on July 16, 1981.

Two provisions of the letter clash. The certification provision requires that in order to collect under the let-

ter, Exxon must certify that HORI failed to deliver the required volume of crude in September-December. On the other hand, the presentment clause requires the certification of non-delivery to be made by October 31, 1981. Exxon learned sometime in November that HORI was going to default. It presented the certification of HORI's default to Paribas on November 30, 1981, and again on December 1, 1981. Paribas rejected both presentments as untimely.

Exxon wants its money.

Making Sense of the Letter of Credit.

In the State of Texas letters of credit are subject to the same rules of construction that apply to ordinary contracts. *Temple-Eastex, Inc., v. Addison Bank*, 672 S.W.2d 793, 798 (Tex.1984); *Republic Nat'l Bank v. Northwest Nat'l Bank*, 578 S.W.2d 109, 115 (Tex.1978). The question of ambiguity in a contract is one of law. *Coker v. Coker*, 650 S.W.2d 391, 394 (Tex.1983); *R & P Enterprises v. LaGuarta, Gavrel & Kirk, Inc.*, 596 S.W. 2d 517, 518 (Tex.1980). A contract is ambiguous only where its meaning remains uncertain after application of the rules of construction. The letter is not ambiguous.

Against the Drafter.

Inconsistencies must be resolved against the party who drew the contract. *Temple-Eastex, Inc.*, 672 S.W.2d at 798; *Republic Nat'l Bank*, 578 S.W.2d at 115. This rule seems especially compelling here. Deposition testimony shows that shortly after the letter was issued a Paribas employee noticed the inconsistency and discussed it with HORI. Paribas never sought to amend the letter to remove the contradiction or to notify Exxon.

Possibility of Performance.

A construction in favor of Exxon is required by the rule that contracts must be construed to render perform-

ance possible. *Temple-Eastex, Inc.*, 672 S.W.2d at 798; *Republic Nat'l Bank*, 578 S.W.2d at 115. Obviously Exxon could not have certified on October 31 that HORI had not delivered through the end of the following two months. Paribas argues that practices in the industry were such that in the normal course of things Exxon should have known by October 31 that HORI would default. Assuming that to be the case, it does not follow that Exxon was bound to make presentment by October 31. The presentment provision required Exxon to certify that HORI had defaulted, not that it probably would. It is difficult to believe that Paribas would have cheerfully paid $19,000,000 to Exxon for a default that had not yet taken place.

BA Commercial Corp. v. Hynutek, Inc., 705 S.W.2d 713 (Tex.App.—Dallas 1986, no writ), supports Exxon's position. In that case the court construed a letter of guaranty that required Hynutek to certify by December 31 that certain payments were more than twenty-five days past due. A payment fell due on December 31, and Hynutek made demand upon the guarantor at the end of January.

Ignoring the dictum about the letters of credit generally, the court in *BA Commercial* identified and applied the rules of construction that resolve this case.

> [A] fair reading of the guaranty shows that such an interpretation would defeat the express intent of the parties.
>
> * * * *
>
> [R]equiring that 25 days notice be given by December 31, 1983, would, in effect, have made a proper demand technically impossible and, therefore, would be contrary to the intent of the parties.

BA Commercial, 705 S.W.2d at 716. The word "purpose" could be well substituted for "intent" in those two passages.

Exxon Could Have Lied.

Paribas, becoming disingenuous, maintains that there was nothing to stop Exxon from certifying by October 31 that HORI had defaulted, although a default had not occurred until mid-November. Paribas purports to have understood the certification simply as "a statement . . . allowing Exxon to recover the proceeds of the letter of credit at any time during the specified period that it believed itself to be at risk in the transaction." (Paribas's January 1986 memorandum of law, p. 15). The court rejects this interpretation of certification for three reasons. First, it strains the court's credulity to believe that Paribas would or should have paid on Exxon's representation that it was merely feeling insecure about HORI's future performance. HORI would have sued Paribas. Second, it is difficult to understand the reason for the requirement of certification if something less than an actual default were enough to trigger payment. One certifies the truth of specific, verifiable facts, not one's fears as to future performance. Had Paribas received a certification from Exxon of an unequivocal announcement of impending default by HORI, Paribas might have accepted it as an anticipatory breach or repudiation, but the facts do not give rise to that argument. Third and most important, where the plain wording of a letter of credit requires a party to certify the past occurrence of specific events, it is inimical to maintain that the actual truth of the certification is of no importance.

Election of Remedies.

Paribas also argues that Exxon cannot recover because Exxon has made an election of remedies. The basis of this claim is that, after failing to obtain payment from Paribas, Exxon in January 1982 entered into an agreement with HORI (1982 agreement). The purpose of this agreement was to rescue HORI's indebtedness to Exxon, both under the agreement that the letter was issued to cover and under another oil exchange agreement on which

HORI had defaulted. In October 1982 HORI defaulted on the 1982 agreement. Exxon filed suit against it, and Paribas argues that in so doing Exxon foreclosed its option to sue Paribas. The court does not agree.

Election of remedies is defined in Texas as "the act of choosing between two or more inconsistent but co-existent modes of procedure and relief allowed by law on the same set of facts." *Custom Leasing, Inc. v. Texas Bank & Trust*, 491 S.W.2d 869, 871 (Tex.1973). The classic example of election of remedies involves a plaintiff's choice between two remedies that may be imposed on the same defendant, as between specific performance and damages in a contract case, or between negligence and intentional injury in a tort action. *Seegers v. Spradley*, 522 S.W.2d 951 (Tex.Civ.App.—Beaumont 1975), writ ref'd n.r.e.); *Fulmer v. Rider*, 635 S.W.2d 875 (Tex. App.—Tyler 1982, writ ref'd n.r.e.). Here, by contrast, Exxon is proceeding under what are really two distinct contracts with two distinct obligors: the letter and the 1982 agreement with HORI.

Accord or Novation.

Similar to the election claim, Paribas argues that the 1982 agreement constituted either an accord and satisfaction or a novation. Neither claim is tenable. There is no indication that there was an agreement express or implied, between Exxon and HORI that Paribas would be released from its responsibility. That intention to release Paribas must have been embodied in their agreement for an accord and satisfaction to exist to Paribas's benefit. *E.g., San Benito Bank & Trust Co. v. Rio Grande Music Co.*, 686 S.W.2d 635, 640 (Tex.App.—Corpus Christi 1984, writ ref'd n.r.e.). There is also no novation between Paribas and Exxon since Paribas and Exxon did not reach any agreement. *See Dodson v. Sizenbach*, 663 S.W.2d 13, 16 (Tex.App.—Houston [14th Dist.] 1983, no writ); *Villarreal v. Laredo Nat'l Bank*, 677

S.W.2d 600, 607 (Tex.App.—San Antonio 1984, writ ref'd n.r.e.).

If HORI had performed the 1982 agreement and if Paribas had then paid Exxon, HORI may have been entitled to recover the payment from Exxon. That did not happen.

Conclusion

A judgment will be entered in favor of Exxon for $19,530,000, pre-judgment interest at 6% from January 1, 1982, post-judgment interest, and costs of court, leaving attorneys' fees the only issue to be decided.

Signed on September 17, 1986, at Houston, Texas.

/s/ Lynn N. Hughes
LYNN N. HUGHES
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 87-2007

D.C. Docket No. CA-H-82-3481

EXXON CORPORATION, U.S.A.,
A DIVISION OF EXXON CORPORATION,
Plaintiff-Appellee
Cross-Appellant,

versus

BANQUE DE PARIS ET DES PAYS-BAS,
Defendant-Appellant
Cross-Appellee.

Appeals from the United States District Court
for the Southern District of Texas

Before RUBIN, GARZA, and JOLLY, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is reversed, and the cause is remanded to the District Court for further proceedings in accordance with the opinion of this Court.

IT IS FURTHER ORDERED that plaintiff-appellee pay to defendant-appellant the costs on appeal, to be taxed by the Clerk of this Court.

October 8, 1987

JONES, Circuit Judge, dissenting.

Issued as Mandate: Dec. 18, 1987

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 87-2007

EXXON CORPORATION, U.S.A.,
A DIVISION OF EXXON CORPORATION,
Plaintiff-Appellee
Cross-Appellant,

versus

BANQUE DE PARIS ET DES PAYS-BAS,
Defendant-Appellant
Cross-Appellee.

Appeal from the United States District Court
for the Southern District of Texas

ON SUGGESTION FOR REHEARING EN BANC

(Opinion 10-08-87, 5 Cir., 198–, —— F.2d ——)
(December 8, 1987)

Before RUBIN, GARZA and JOLLY, Circuit Judges.

PER CURIAM:

(✓) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ [Illegible]
United States Circuit Judge

APPENDIX E

No. 07-86-0205-CV

IN THE COURT OF APPEALS
FOR THE SEVENTH DISTRICT OF TEXAS
AT AMARILLO
PANEL A

NOVEMBER 17, 1987

KERR CONSTRUCTION COMPANY and the
CITY OF LUBBOCK,
Appellants

v.

THE PLAINS NATIONAL BANK OF LUBBOCK,
Appellee

From the District Court of Lubbock County;
72nd Judicial District No. 85-509,842-A;
HONORABLE DENZIL BEVERS, JUDGE

Before REYNOLDS, C.J., and DODSON and BOYD, JJ.

Kerr Construction Company and the City of Lubbock appeal from the trial court summary judgment on Kerr and the City's action to recover on a letter of credit issued by the Plains National Bank of Lubbock. By their first point of error, Kerr and the City claim the trial court erred by granting the Bank's motion for summary judgment and by denying their motion for summary judgment. We agree, reverse the trial court's judgment, render judgment for Kerr and the City, sever Kerr and

the City's action for attorney's fees, and remand that action to the trial court for a determination of the amount of attorney's fees.

The record shows that on 15 September 1984, Kerr contracted with Cary L. Johnson to "pave" the subdivision Johnson was developing. In consideration for $63,768.13, the contract required Kerr to furnish all labor and materials for paving, curbs, gutters, alley returns, and drainage. One of the conditions of the paving contract required Johnson to secure the obligation of payment by the issuance of a letter of credit to the City. Johnson complied with the requirement of the contract by securing the issuance of a letter of credit by the Bank two days later, on 17 September 1984.

The letter of credit prepared and issued by the Bank reads:

PLAINS
NATIONAL BANK OF LUBBOCK
50th St. at University Ave./Box 271
Lubbock, TX 79408/(806) 795-7131

Irrevocable Letter of Credit No. *485*

The Meadows Addition, Lots 1346-1433
September 17, 1984

Honorable Mayor and City Council
City of Lubbock
P.O. Box 2000
Lubbock, Texas 79457

Dear Sir:

We hereby authorize you to draw on us for the account of Mr. Cary L. Johnson up to an aggregate amount of U.S. $63,768.13 available by your draft at sight when accompanied by your signed statement that the contractor Kerr Construction Company has defaulted or failed within ten (10) months to complete the paving improvements required in conjunc-

tion with the platting of The Meadows Addition, Lots 1346-1433.

It is a condition of this letter of credit that it shall be extended without amendment for an additional period of six (6) months from the expiration date hereof unless thirty (30) days prior to such expiration date we shall notify you, Attention: The Property Development Coordinator, in writing by registered mail at the above address that we elect not to renew this letter of credit for such additional period.

In the event we elect not to renew this letter of credit, this letter of credit will be payable against your signed statement that Cary L. Johnson is still obligated under the City of Lubbock Code Section 25-6-B (6) to provide a cash deposit and has failed either (1) to replace this letter of credit with another letter of credit within fifteen days from the expiration date of this credit, or (2) to provide a cash deposit to the City of Lubbock in accordance with the City of Lubbock Code Section 25-6-B (6).

Your drafts must bear the clause "DRAWN UNDER THE PLAINS NATIONAL BANK OF LUBBOCK AT LUBBOCK, LETTER OF CREDIT NO. 485."

We hereby engage with you that your draft(s) under and in compliance with the terms of this letter of credit will be duly honored if presented to us on or before January 1, 1985 together with the document(s) specified herein.

Sincerely yours,

/s/ Jim R. Shearer
JIM R. SHEARER
Senior Vice President
The Plains National Bank
of Lubbock
Lubbock, Texas

(emphasis added)

Kerr performed the paving contract to the extent of $50,174.75, but Johnson failed to pay Kerr. Kerr accordingly ceased work with the balance of the contract remaining unperformed, representing some $13,593.38 of the contract amount. The contract remained uncompleted on 17 July 1985, ten months after the date of the letter.

On that ten-month anniversary, 17 July 1985, the City drafted on the Bank to pay $63,768.13. The Bank denied any liability on the basis that the letter of credit expired by its terms on 1 July 1985. The Bank asserted that 1 January 1985 represented the initial due date which was automatically extended until 1 July 1985, because the Bank never gave the notice that prevented the automatic extension for an additional six months.

Kerr and the City accordingly sued to collect on the letter of credit. Kerr sought its unpaid amount of $50,174.75, and the City sought the total amount of the letter, $63,678.13 (the City, however, recognizing that Kerr is entitled to $50,174.75 of the total amount with the City being entitled to the balance). Both Kerr and the City also requested prejudgment and post-judgment interest and attorney's fees. Since the district court granted summary judgment for the Bank it had no occasion to award any interest or find an amount for attorney's fees.

This case raises the single issue of the due date of the letter of credit. That issue is resolved by our construction of the document. The Bank sought and obtained summary judgment on the ground that the letter of credit expired on 1 July 1985. On the other hand, Kerr and the City sought and were refused summary judgment on the basis that the letter of credit, properly construed, was never due, as a matter of law, until 17 July 1985, ten months after its issue.

It is well settled that the rules of construction for ordinary contracts govern letters of credit. Temple-

Eastex Inc. v. Addison Bank, 672 S.W.2d 793, 798 (Tex. 1984). It is equally well settled that where there is an irreconcilable conflict between different parts or provisions of an instrument and the first part or provision is definite and certain and irreconcilable with later parts or provisions, the first part or provision must prevail. Benskin v. Barksdale, 246 S.W. 360, 363 (Tex. Comm'n App. 1923, judgm't adopted). In this instance, it is undisputed that the first provision (the first paragraph) of the instrument is in direct and irreconcilable conflict with the last provision (the last paragraph) of the instrument.

The first numbered paragraph provides: "We hereby authorize you to draw on us for the account of Mr. Cary L. Johnson up to an aggregate amount of U.S. $63,768.13 available by your draft at sight when accompanied by your signed statement *that the contractor Kerr Construction Company has defaulted or failed within ten (10) months to complete the paving improvements required* in conjunction with the platting of The Meadows Addition, Lots 1346-1433" (emphasis added). That paragraph states the condition precedent to the Bank's liability and, as such, is the most significant and essential provision in the agreement. In the absence of a default or failure by Kerr Construction Company to complete the paving improvements within ten months from 17 September 1984, there is no liability on the Bank.

It is well settled then when there is an irreconcilable conflict between provisions in an agreement, the provision which contributes most essentially to the agreement is entitled to the most consideration. Osburn v. Smart, 58 S.W.2d 1073, 1078 (Tex.Civ.App.—Fort Worth 1932, writ dism'd) (opinion on motion for rehearing). In *Osburn*, the court also acknowledged and applied the rule that where there is an irreconcilable conflict between

clauses or provisions in the contract, the expression in the clause or provision first appearing will control. In this instance, we conclude that the time stated in the first unnumbered paragraph prevails over the time stated in the last unnumbered paragraph.

The Bank points out that the usual letter of credit transaction is comprised of three separate contracts. The first contract is between the parties (Kerr and Johnson) to the underlying obligation. The second agreement is by and between the Bank and its customer (Johnson). The third agreement is the letter of credit which is between the Bank and the beneficiary (the City). In that regard and relying on Westwind Exploration v. Homesite Sav. Ass'n, 696 S.W.2d 378 (Tex. 1985), and Summitt Ins. Co. v. Central Nat. Bank of Houston, 624 S.W.2d 222 (Tex.Civ.App.—Houston [1st Dist.] 1981, writ ref'd n.r.e.), the Bank contends that the first paragraph is merely a general reference to the underlying agreement between Kerr and Johnson and that reference to the underlying agreement in letters of credit is considered surplusage and should not be considered in deciding whether the beneficiary has complied with the terms of the letter of credit.

In Summit Ins. Co. v. Central Nat. Bank of Houston, 624 S.W.2d at 225, the court stated, "General references to underlying agreements are surplusage and should not be considered in deciding whether the beneficiary has complied with the terms of the credit." However, immediately preceding that statement, the court stated, "The beneficiary's non-compliance with the underlying contract does not affect the issuer's liability *unless a reference to the underlying contract explicitly creates a condition for honoring a draft*" (emphasis added). *Id.* In this instance, as we stated above under the first paragraph, the Bank's liability on the letter of credit is expressly conditioned on Kerr's default or failure to com-

plete the paving improvements within ten months. The Bank's general reference contention is overruled.

The Bank further contends that the trial court properly rendered summary judgment for the Bank because Kerr is not a beneficiary of the letter of credit. Under that contention, the Bank argues that its "liability on the Letter of Credit is limited to the cost of completing the improvements undertaken and such liability only extends to the beneficiary." The letter of credit does not state that the Bank's liability is limited to the cost of completion. By the expressed provision in the letter of credit, the Bank's liability is stated as "up to an aggregate amount of U.S. $63,768.13."

The fact that the Bank issued the letter of credit to the City as the primary beneficiary does not alter or relieve the Bank from its full obligation ($63,768.13) under the letter of credit. An implicit purpose of the letter of credit was assurance to the City and Kerr that the paving improvements would be completed and paid for at the stated price. In that regard, it is undisputed that the stated price of the improvements was $63,768.13. Likewise, the Bank's obligation under the letter of credit is in the same amount. Also, it is undisputed that Kerr completed $50,174.75 of the paving improvements and that $13,593.38 of the paving improvements remained uncompleted. Consequently, for the reasons stated, we conclude that the trial court erred by granting the Bank's motion for summary judgment and by denying Kerr and the City's motion for summary judgment.

In summary, Kerr and the City's first point of error is sustained. Accordingly, we reverse the trial court's judgment and render judgment that Kerr Construction Company do have and recover of and from Plains National Bank of Lubbock the amount of $50,174.75, plus prejudgment interest at the rate of ten (10%) percent per annum from 17 July 1985 to 23 June 1986, com-

pounded daily, as prescribed by article 5069-1.05, section 2 of the Texas Revised Civil Statutes Annotated (Vernon 1987) and 11 Texas Register 2396, plus post-judgment interest at the rate of ten (10%) percent per annum from 24 June 1986, compounded daily, as prescribed by article 5069-1.05, section 2 and 11 Texas Register 2396, until the judgment is fully paid; and, that the City of Lubbock do have and recover of and from Plains National Bank of Lubbock the amount of $13,593.38, plus prejudgment interest at the rate of ten (10%) percent per annum from 17 July 1985 to 23 June 1986, compounded daily, as prescribed by article 5069-1.05, section 2 and 11 Texas Register 2396, plus post-judgment interest at the rate of ten (10%) percent per annum from 24 June 1986, compounded daily, as prescribed by article 5069-1.05, section 2 and 11 Texas Register 2396, until the judgment is fully paid. Also, Kerr and the City's claim for attorney's fees is severed from this action and remanded to the trial court for further determination.

All costs are taxed against Plains National Bank of Lubbock.

CARLTON B. DODSON
Justice

Do not publish. Tex. R. App. P. 90(e).

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 87-2007

EXXON CORPORATION, U.S.A.,
A DIVISION OF EXXON CORPORATION,
Plaintiff-Appellee
Cross-Appellant,

versus

BANQUE DE PARIS ET DES PAYS-BAS,
Defendant-Appellant
Cross-Appellee.

Appeal from the United States District Court
for the Southern District of Texas

[Filed Feb. 12, 1988]

ORDER:

The motion of Appellee, Exxon Corporation, for recall and stay of the issuance of the mandate pending petition for writ of certiorari is DENIED, because, inter alia, Rule 90(i) of the Texas Rules of Appellate Procedure states:

> Unpublished opinions shall not be cited as authority by counsel or by the court.

/s/ [Illegible]
United States Circuit Judge

APPENDIX G

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 87-2007

EXXON CORPORATION, U.S.A.,
A DIVISION OF EXXON CORPORATION,
Plaintiff-Appellee
Cross-Appellant,

versus

BANQUE DE PARIS ET DES PAYS-BAS,
Defendant-Appellant
Cross-Appellee.

Appeal from the United States District Court
for the Southern District of Texas

[Filed Feb. 12, 1988]

ORDER:

The motion of Appellee, Exxon Corporation, for leave to file a second suggestion for rehearing en banc is DENIED.

/s/ [Illegible]
United States Circuit Judge

APPENDIX H

EXXON CORPORATION

Affiliates and Subsidiaries—Not Wholly-Owned*

Abu Dhabi Petroleum Company Limited
Ace Polymer Co., Ltd.
Aditivos Orinoco, C. A.
Adria-Wien Pipeline Gesellschaft mit beschrankter Haftung
Aircraft Fuel Supply B. V.
Aishin Sekiyu K. K.
Alberta Products Pipe Line Ltd.
Al-Jubail Petrochemical Company
Altona Petrochemical Company Limited
Alyeska Pipeline Service Company
Andian National Corporation, Limited
Arabian American Oil Company
Aramco Overseas Company
Aramco Services Company
Asakawa Sekiyu K.K.
Asociacion Civil "Academy La Castellana"
Atlas Supply Company
Atlas Supply Company of Canada Limited
Australian Synthetic Rubber Company Limited
Aviation Services Saudi Arabia Limited
Awaji Gas Nenryo Kabushiki Kaisha
Azuma Sekiyu K.K.
BEB Erdgas und Erdol GmbH, Hannover
BT Asia Securities Limited
B.W.O.C., Inc.
Bangkok Aviation Fuel Services Limited
Banshu Ekika Gas K. K.
Bayerische Erdgasleitung G.m.b.H.
Beaverhill Resources Limited
Bel-Air Entreposage S. A.

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* Does not include companies with less than 5% Exxon Ownership.

BRIGITTA Erdgas und Erdol GmbH, Hannover
Bryan Woodbine Gathering Inc.
Byron Creek Collieries (1983) Limited
Carlew Inc.
Carnduff Gas Limited
Cary Chemicals Inc.
Castle Peak Power Company Limited
Champlain Oil Products Limited
Changi Airport Fuel Hydrant Installation Pte, Ltd.
Chuo Sekiyu Hanbai K.K.
Commercial Polymers Pty. Ltd.
Compagnie d'Etancheite Africaine en Cote d'Ivoire S. A.
Compania Minera Disputada de Las Condes S.A.
Comptoir Auxiliarie du Petrole
Comptoir Oxonnaxien des Combustibles (C.O.C.)
Computer Centrum Groningen B.V.
DFTG Deutsche Flussigerdgas Terminal GmbH
Daihatsu Sekiyu K.K.
Daiichi Kouyu K. K.
Demulsificantes Del Orinoco, C.A.
Depot Petrolier du Gresivaudan
Depots de Petrole Cotiers
Depots Petrolier de la Corse
Deudan-Holding GmbH
Deutsche Erdgas Transport G.m.b.H.
Deutsche Transalpine Oelleitung G.m.b.H.
Devon Estates Limited
Dixie Pipeline Company
Dukhan Service Company
E S F Limited
Eagle Kenso K.K.
East Japan Oil Development Company, Limited
East Texas Salt Water Disposal Company
Eiko Sekiyu K.K.
Elwerath Erdgas und Erdol GmbH, Hannover
Elwerath Erdol und Erdgas AG
Emirates Chemicals Company
Emori Sekiyu K.K.

Emsland-Erdolleitung G.m.b.H.
Energie Marketing Service GmbH (EMS)
Entrepot Petrolier de l'Aveyron (E.P.A.)
Entrepot Petrolier de Mulhouse (E.P.M.)
Erdgas-Verkaufs-Gesellschaft m.b.H.
Escuela Las Morochas, C. A.
Esso Chemical Alberta Limited
Esso Energie G.I.E.
Esso Exploration and Production Angola Inc.
Esso Malaysia Berhad
Esso of Canada Limited
Esso Resources Canada Limited
Esso Societe Anonyme Francaise
Esso Standard Tunisie S. A.
Etablissements Cloarec
Exact Reisebyra A/S
Exxon Chemical Pakistan Limited
489061 Ontario Inc.
F. T. Giken Kabushiki Kaisha
Federated Pipe Lines Ltd.
Ferngas Nordbayern G.m.b.H.
Ferngas Salzgitter GmbH
Forjas de Colombia, S. A.
Fuji Kogyo K.K.
Gasunie Engineering B.V.
General Bussan K.K.
General Highway K.K.
General Petrochemical Industries Limited
General Sekiyu K.K.
General Sekiyu Okinawa Hanbai K.K.
General Sekiyu Overseas Ltd.
General Shipping Co. Ltd.
General Unyu Kabushiki Kaisha
Geobutane—Lavera
Gewerkschaft Brassert Erdol und Erdgas GmbH
Gewerkschaft Elwerath & Co. GmbH
Gewerkschaft Erdol-Raffinerie Deurag-Nerag
Gewerkschaft Gute Hoffnung Erdgas und Erdol GmbH

Gewerkschaft Kuchenberg Erdgas und Erdol GmbH
Goroku Sekiyu K.K.
Grande Ecaille Land Company, Inc.
Groupement Immobilier Petrolier
Groupement Petrolier Aviation
Groupement Petrolier de la Cote D'Azur
Groupement Petrolier de Nantes
Groupement Petrolier du Finistere G.I.E.
Hannoversche Erdolleitung G.m.b.H.
Hanshin Kyowa Sekiyu K.K.
Hayakawa Sekiyu K.K.
Heinrich Schneider Spedition GmbH
Hiroshima General Gas Juten Kabushiki Kaisha
Hoei Sekiyu K.K.
Hokushin Bussan K.K.
Hokuyu Sekiyu K. K.
Home Energy Company Ltd.
Home Oil Company Limited
Houston Regional Monitoring Corporation
Hydranten-Betriebsgesellschaft
Hydrierwerke Poelitz Aktiengeselischaft
Imperial Oil Limited
Imperial Pipe Line Company, Limited, The
Inada Ekka Gas Kabushiki Kaisha
Industry Promotion Enterprises Limited
Interprovincial Pipe Line (Alberta) Ltd.
Interprovincial Pipe Line Limited
Interprovincial Pipe Line (NW) Ltd.
Intoplane Service Company Limited
Iranian Oil Participants Limited
Iranian Oil Services (Holdings) Limited
Iranian Oil Services Limited
Iraq Petroleum Company, Limited
Iraq Petroleum Pensions, Limited
Japan Butyl Company Limited
Japan Coal Liquefaction Development Company, Ltd.
Jersey Nuclear-Avco Isotopes, Inc.
K.K. Aizu General

K.K. Daimaru
K.K. General Sekiyu Hanbaisho
K.K. Genetech
K.K. Heian Sekiyu
K.K. Kanagawa Sekiyu Shokai
K.K. Kyoei Shosha
K.K. Kyowa Sekiyu Service
K.K. Marugo Izumasa Shoten
K.K. Nippatsu
K.K. Standard Sekiyu Osaka Hatsubaisho
K.K. Toresen
K.K. Uwano Sekiyu Shokai
K/S Statfjord Transport A/S & Co.
Kabushiki Kaisha Sankyo Plastics
Kai Tak Refuellers Company Limited
Kanto Kygnus Sekiyu Hambai K.K.
Karlsruhe-Stuttgart Rohrleitung Gesellschaft mbH
Kawasaki Kygnus Sekiyu Hambai Kabushiki Kaisha
Keiyo Sekiyu Hanbai K.K.
Kenya Petroleum Refineries Limited
Kibo Sekiyu Hanbai K.K.
Kimura Sekiyu Kabushiki Kaisha
Kinwa Sekiyu K.K.
Kobe Port Service Kabushiki Kaisha
Kobe Standard Sekiyu K. K.
Kowa Sekiyu K.K.
Kowloon Electricity Supply Company Limited
Kygnus Ekka Gas Kabushiki Kaisha
Kygnus Kosan Kabushiki Kaisha
Kygnus Marketing Service K.K.
Kygnus Sekiyu K.K.
Kyushu Eagle K.K.
LPL Investments, Inc.
Lakehead Pipe Line Company, Inc.
LEAG Aktiengesellschaft fur luzernisches Erdol
Les Docks des Petroles d'Ambes
Long Beach Oil Development Company
Maasvlakte Coal Terminal B.V.

Maasvlakte Olie Terminal N.V.
Magota Sekiyu K.K.
Mainline Pipelines Limited
Maple Leaf Petroleum Limited
Maquinas de Coser y Bordar Sigma, S.A.
Marugo Gas K.K.
MEGAL FINCO
MEGAL GmbH
Meiji Sekiyu K.K.
MESBIC Financial Corporation of Houston
Metro Fuel Co. Ltd.
Mikawa Bussan K.K.
Minerals Limited
Mittelrheinische Erdgas Transport Gesellschaft mit beschrankter Haftung
Montreal Pipe Line Limited/Les Pipe-Lines Montreal Limitee
Mr. Lube Canada Inc.
Mytex Polymers Incorporated
NAM—K 7 B.V.
NAM—K 14 B.V.
NAM—K 15 B.V.
NAM/CLOMS—K 8/K 11 B.V.
NAM/CLOMS—L 13 B.V.
N. V. Nederlandse Gasunie
NPC Services, Inc.
Nakabayashi Sekiyu K.K.
Nansei Oil Terminal K.K.
Nansei Sekiyu Kabushiki Kaisha
Native Venture Capital Co. Ltd.
Near East Development Corporation
Nederlandse Aardolie Maatschappij B. V.
Neptune Bulk Terminals (Canada) Ltd.
Nichimo Oil (Bermuda) Co., Ltd.
Nichimo Sekiyu Seisei Kabushiki Kaisha
Nikko Sangyo K.K.
Nippon Unicar K.K.
Nisku Products Pipe Line Company Limited

Nissei Sekiyu Kabushiki Kaisha
Norddeutsche Erdgas-Aufbereitungs G.m.b.H.
Norddeutsche Mineraloelwerke Stettin G.m.b.H.
Nordrheinische Erdgas Transport Gesellschaft
mit beschrankter Haftung
Nord-West Oelleitung G.m.b.H.
Northward Developments Ltd.
Northwest Company, Limited
Nottingham Gas Limited
107580 Canada Inc.
139675 Canada Limited
151742 Canada Inc.
158437 Canada Ltd.
158883 Canada Inc.
159129 Canada Inc.
Office Prive d'Assurances et de Courtages
Offshore Medical Support Limited
Oil Field Chemicals Company (Saudi Arabia) Ltd.
Oil Service Company of Iran (Private Company)
Oil Spill Response Limited
Oil Transport Company (Saudi Arabia) Limited
Oldenburgische Erdol Gesellschaft m.b.H.
Osaka Ashyu Nenryou K.K.
Osaka Propane Gas Hambai Kabushiki Kaisha
Osaka Sekiyu Gas Yuso K.K.
P.A.C. S.A.R.L. (Pinson Allegret-Causse)
P. T. Stanvac Indonesia
Pars Investment Corporation
Peninsula Electric Power Company Limited
Petroleum Refineries (Australia) Proprietary Limited
Petroleum Services (Middle East) Limited
Petrosvibri S.A.
Pipe Line Services, Inc.
Plantation Pipe Line Company
Polder-Seehafen-Harburg GmbH
Portland Pipe Line Corporation
Primaer Oel GmbH
Progas A/S
Raffinerie du Midi S.A.R.L.

Rainbow Pipe Line Company, Ltd.
Redwater Water Disposal Company Limited
Refineria Petrolera Acajutla, S. A.
Rheingas Erdgasleitungs-Gesellschaft m.b.H.
Rochevert Inc.
Rotterdam Antwerpen Pijpleiding (Belgie)
Rotterdam-Antwerpen Pijpleiding (Nederland) N. V.
Ruhrgas Aktiengesellschaft
S.A. du Pipeline a Produits Petroliers sur
Territoire Genevois (SAPPRO)
S.A.R.L. Viain
SEAG Aktiengesellschaft fur schweizerisches Erdol
S.O.P.—Societa Oleodotti Padani S. p. A.
Saitama Sekiyu Hanbai K.K.
Sakurajima Futo K.K.
Sanko Oil Kabushiki Kaisha
Sanyo Sekiyu K.K.
Saraco S. A.
Saudi Arabian Lube Additives Company Limited
Schubert KG
Scurry-Rainbow Oil Limited
Seibu Kygnus Sekiyu Hambai Kabushiki Kaisha
Seismic Industries A/S
Senpoku Oil Service K.K.
SERAM Societa per Azioni
Servacar Ltd.
Shehtah Drilling Limited
Shimoka Sekiyu Kabushiki Kaisha
Shimoyama Sekiyu K.K.
Shin-Nihon Yukagaku Kogyo K.K.
Shinohara Oil K.K.
Shizucka Kanesho Hambai Kabushiki Kaisha
Smiley Gas Conservation Limited
Sociedad Anonima "Escuela Campo Alegre"
Sociedad de Inversiones de Aviacion
Sociedad Nacional de Oleoductos Ltda.
Societa Italiana per l'Oleodotto Transalpino S.p.A.
Societa per Azioni Raffineria Padana Olii
Minerali-SARPOM

Societe Anonyme de la Raffinerie des Antilles
Societe Anonyme des Hydrocarbures
Societe Anonyme "Produits Lubrifiants de Madagascar"—PROLUMA S.A.
Societe Belge de Transport par Pipeline
Societe Civile de Mustapha Algerie
Societe Civile de Participation pour la Destruction des Dechets Industriels (SOCDI)
Societe Civile Immobiliere "Courcelles-Etoile"
Societe Civile Immobiliere de la Croix au Chene
Societe Civile Immobiliere du 195 Avenue de Neuilly
Societe Civile Immobiliere Khariessa
Societe Civile Immobiliere "Kleber-Etoile"
Societe Civile Immobiliere "Les Casseaux Bougainville"
Societe de la Raffinerie d'Alger
Societe de la Raffinerie de Lorraine
Societe de Manutention de Carburants Aviation (S.M.C.A.)
Societe de Manutention de Carburants Aviation Dukar-Yoff, S. A.
Societe de Promotion et de Financement Touristique (CARTHAGO)
Societe d'Entreposage de San-Pedro
Societe des Pipe-Lines de Strasbourg
Societe des Transports Petroliers par Pipe Line
Societe d'Exploitation & de Developement d'Operations Commerciales
Societe du Caoutchouc Butyl (SOCABU)
Societe du Pipe Line de la Raffinerie de Lorraine
Societe de Pipe-Line Mediterranee-Rhone
Societe du Pipeline Sud-Europeen
Societe Esso de Recherches et d'Exploitation Petrolieres Esso Rep
Societe Francaise Exxon Chemical
Societe "Geominest-Caen"
Societe Havraise de Manutention de Produits Petroliers
Societe Hoteliere de la Petite Campagne

Societe Immobiliere Paris-Niel
Societe Ivoirienne d'Operations Petrolieres S.A.
Societe Malgache de Raffinage
Societe Reunionnaise d'Entreposage
Socony-Standard-Vacuum Oil Company
(Petroleum Maatschappij)
Southern Natural Gas Development Pty. Ltd.
Standard Kosan Kabushiki Kaisha
Standard Service K.K.
Statfjord Transport A/S
Stockage Geologique de Gaz de Lavers
Suddeutsche Erdgas Transport Gesellschaft
mit beschrankter Haftung
Sulbath Exploration Ltd.
Sun East Company Ltd
Supertex, Inc.
Sydis, Inc.
Syncrude Canada Ltd.
Synergistics Industries Limited
System Plaza Kabushiki Kaisha
TAR-Tankanlage Rumlang AG
TBN Tanklager-Betriebsgesellschaft Nurnberg mbH
Taglu Enterprises Ltd.
Taihei Bussan K.K.
Taiko Sekiyu K.K.
Taisei Kogyo Sekiyu Hanbai K.K.
Takahama Kosan Kabushiki Kaisha
Taketsuru Yugyo K.K.
Tanaka Sekiyu Hanbai K.K.
Tankanlage A. G., Mellingen
Tanklager Altishausen A. G.
Tanklager Gesellschaft, Koln
Tanklager-Gesellschaft Tegel
Tanklager Lechelles I S.A.
Tanklager Taegerschen AG
Tecnica Quimica Petrolera, S.A. de C. V.
Tecumseh Gas Storage Limited
THUMS Long Beach Company

Thyssengas G.m.b.H.
TIBA Speditions GmbH
Toa Nenryo Kogyo Kabushiki Kaisha
Tohko Plastics Company, Limited
Tohpren Co. Ltd.
Toko Sekiyu K.K.
Tonen Energy International Corp.
Tonen Maintenance K.K.
Tonen Sekiyukagaku Kabushiki Kaisha
Tonen Tanker Kabushiki Kaisha
Tonenu Technology K. K.
Towa Compounding Co. Ltd.
Towa Sekiyu K.K.
Toyoshina Film Company, Ltd.
Transalpine Oelleitung in Oesterreich Gesellschaft m.b.H.
Trans-Arabian Pipe Line Company
Transgaz Lavera
Tsurumaru Unyu K.K.
Turkish Petroleum Company, Limited
UBAG—Unterflurbetankungsanlage Flughafen Zurich
Van Salt Water Disposal Company
W.A.G. Pipeline Proprietary Limited
Wako Jushi Kabushiki Kaisha
Wako Kasei Kabushiki Kaisha
Wartempomp Nederland B.V.
Westdautsche Erdolleitungs-G.m.b.H.
Westgas G.m.b.H.
Westgastransport B.V.
Winnipeg Pipe Line Company Limited
Worex S.N.C.
Yasaka Sekiyu K.K.
Yellowstone Pipe Line Company
Yoshiki Sekiyu Kabushiki Kaisha
Yoshimi Gas Kabushiki Kaisha
Yuai Sekiyu K.K.
Yugen Kaisha Nishi Kobe Bosai Center